IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CACR019/2013
CICA (Crim) 19 of 2013
IND 63/11
SCA01/2012C#01636/2011

BETWEEN:	**SEAFORD LABORDE**	**APPELLANT**
	and	
	THE QUEEN	**RESPONDENT**

Before:

The Honorable Mr. Justice Mottley, Justice of Appeal

The Right Honorable Sir Anthony Campbell, Justice of Appeal

The Honorable Mr. Justice Martin, Justice of Appeal

Appearances:

Ms. Lucy Organ of Samson & McGrath for the Appellant

Mr. Alexander Upton Crown Counsel for the Director of Public Prosecutions

Hearing and Judgment delivered: 4 April 2014

Reasons released: 24 October 2014

Mottley J.A.

1. The Appellant was convicted on 22 December 2011 by the Chief Magistrate of possessing cocaine with intent to supply. On 30 January 2012, he was sentenced to a term of imprisonment of 14 years.

2. The Appellant appealed his conviction and sentence to the Grand Court. On 23 August 2013, Mr. Justice Henderson dismissed the appeal and affirmed both the conviction and sentence. He now seeks leave of this Court to appeal against his sentence.

3. On 5 March 2011, the police conducted an undercover operation in the vicinity of the port in Georgetown. The Appellant was seen sitting on a bench on Edward Street in Georgetown. He was holding a charcoal grey plastic bag. A detective constable, posing as a tourist approached him and had a conversation with him about obtaining cocaine. Following communication between the detective constable and other officers who were nearby, an unmarked police car arrived and parked on Edward Street. Upon seeing the police officers get out of the vehicle, the Appellant told the undercover detective to walk with him, which he did. As they walked away, the Appellant left the bag on the bench. The Appellant was subsequently detained and searched; nothing was found on him.

4. The police took possession of the grey plastic bag which was found to contain a large quantity of white powder. The Appellant was subsequently arrested on suspicion of possession of cocaine and possession with intent to supply cocaine contrary to the Misuse of Drugs Ordinance. On being cautioned by the police, the Appellant said that he did not know anything about any drug. When the white powder was analyzed, it was found to be 987grams (34 ounces) of cocaine hydrochloride (a salt of cocaine); the street value was estimated to be between $49,200.00 C.I. to $98,400.00 C.I.

5. In imposing the sentence of 14 years' imprisonment, it does not appear that the Chief Magistrate made any comments; at any rate the record does not contain any remarks made by her. Indeed, Mr. Justice Henderson, who heard the appeal, proceeded on the basis that the Chief Magistrate did not make any comments.

6. A person who is grieved by a judgment of the Grand Court in the exercise of its appellate jurisdiction may, subject to the Court of Appeal Law, appeal against the sentence imposed by the Grand Court. (See section 29 of the Court of Appeal Law (2011 Revision)). Under section 7 (c) of the Law, leave of the Court of Appeal is required to appeal against sentence.

7. Ms. Organ for the Appellant submitted that it is clear that the Chief Magistrate took as a starting point, 15 years imprisonment. She stated that Mr. Justice Henderson assumed that the Chief Magistrate used 15 years' imprisonment as the starting point; the judge concluded this was correct. Counsel contended that it was incorrect. She argued that to use a starting point of 15 years' imprisonment, both the Chief Magistrate and the judge would have had to be satisfied that the offence involved "substantial importation or dealing in any way with powder or crack cocaine". "Substantial" she stated, is defined as "any transaction involving several ounces or kilo quantities.

8. The Appellant had in his possession four packages which contained white powder which was proven to be cocaine hydrochloride – a salt of cocaine and which weighed 987 grams or 34 ounces. Counsel submitted that this was the only aggravating feature in this case. The evidence did not show that children or users were in the vicinity of the Appellant when he was approached by the detective constable. Counsel submitted that the amount

of cocaine in this case falls between the amounts in *Gunter v R* SCA 36/2002 and *Watson-Manaham v R* 2000 CILR Note 16 a).

9. Mr. Upton, on behalf of the Director of Public Prosecutions, submitted that the only mitigating feature in this matter is the Appellant's previous good character insofar as drugs were concerned. He said that in deciding whether the sentence of 14 years imprisonment was excessive, regard ought indeed to be had to *Gunter's* case and *Stephen Whittaker v R* CICA Crim No. 2 of 2012.

10. In *Gunter*'s case, the Appellant was arrested at the International Airport on Grand Cayman. He was found to be in possession of sixty four pellets of salt of cocaine weighing 383.4 grams (13.56 ounces). He informed the police that he had purchased the cocaine in Jamaica and intended to sell it in the Cayman Islands for US $500.00 per ounce. He pleaded guilty before the Magistrate who imposed a sentence of 10 years' imprisonment. Gunter appealed to the Grand Court. Henderson J, in his judgment indicated that the Magistrate had arrived at her sentence by using a starting point of imprisonment for 12 years as she considered that the Appellant's guilty plea was a mitigating factor. However, the Appellant had purchased the cocaine himself and intended to distribute it in the Cayman Islands himself. These were considered by the Magistrate as aggravating factors. The judge concluded that the Magistrate gave no weight to the guilty plea. The judge referred to the Sentencing Tariffs and Guidelines which had been announced at the opening of the Grand Court in January 2002. The relevant passages from the Guidelines are set out below. The judge indicated that as the Appellant was attempting to import a quantity of cocaine which was substantially in excess of 2 ounces, the Magistrate was not wrong in principle in taking a starting point of

12 years. He dismissed the appeal on the ground that the sentence was not shown to be manifestly excessive.

11. In the case of *Watson & Mananham v R*, the Second Appellant pleaded guilty to importing 2 kg of cocaine; in so doing he implicated the First Appellant who gave the police a statement leading to the conviction of the supplier and the recovery of 22 kg of cocaine. The First Appellant, who had earlier pleaded not guilty to being concerned in the importation of the drug, later pleaded guilty to a substantive charge of being concerned in the possession of cocaine with intent to supply. Both Appellants were sentenced to 10 years' imprisonment. The Magistrate considered the First Appellant's guilty plea as "coming late in the day". Mr. Justice Graham indicated that the appropriate sentence for importation or being concerned in the importation or supply of 2 kg of cocaine was 15 years' imprisonment on a not guilty plea and 12 years on a guilty plea subject to mitigation. Both Appellant had given substantial help to the police; 10 years would have been the appropriate sentence. The judge indicated that the Magistrate had clearly not given full credit for the First Appellant's guilty plea following the preferment of the new charge. The judge expressed the view that a further year would be deducted from each term. It should be noted that this case was determined prior to the Guidelines coming into force.

12. In *Stephen Whittaker v Regina* CICA (Crim) No 2 of 2012, the applicant for leave to appeal, was on 2 February 2011 sentenced by the Chief Magistrate on three counts involving the possession of cocaine including a count of possession with intent to supply. Just over four years earlier, he had been arrested at the International Airport after being searched and was found with two packages containing 375 grams of cocaine base. He had

been sentenced by the Chief Magistrate to 12 years imprisonment on each count, to run concurrently. He appealed to the Grand Court where Mr. Justice Williams reduced the sentence to 10 years. The Appellant sought leave to appeal to this Court from this decision of the judge. The President of the Court observed that the Chief Magistrate had "reminded herself that the Chief Justice's Sentencing Guideline indicated a starting point of some 10 to 12 years on a not guilty plea for an amount of cocaine of 375 grams. It was submitted that "having started with an indicated tariff sentence of twelve years, that is where the Chief Magistrate ended up; giving no discount either for a guilty plea or mitigating circumstances." The President rejected the submission that the starting point of twelve years after a trial was too high; the appropriate starting point for an offence of this nature should have been in the region of ten years after a trial. The President, in rejecting the application for leave to appeal, concluded that the Court can see no basis upon which it would be right to interfere with the conclusion of Mr. Justice Williams that a reduction of two years from a sentence of twelve years gave sufficient recognition both of the relevant mitigating factors and of the guilty plea.

13. In the Statement on Tariffs and Guidelines for Sentencing for Certain Offences issued by the Chief Justice on 16 January 2002, in the section dealing with Drug Offences under the Misuse of Drugs Law, it is stated:

> "For offences involving 2 ounces or more or 4 grams or more of cocaine base without mitigating circumstances the tariff will be 10 to 12 years. 15 years or more will be imposed where such an offence involves substantial importation or dealing in anyway either in powder or crack cocaine. We

would define ‘substantial importation or dealing’ as any transaction involving several ounces or kilo quantities.”

14. The applicant was convicted of being in possession of 987 grams or 34 ounces of cocaine hydrochloride (a salt of cocaine). The amount brings it within the definition of substantial dealing.

15. Mr. Justice Henderson observed that it seemed likely that the Chief Magistrate took as her starting point, 15 years and then reduced that figure to 14 years to reflect the sole mitigating factors which were brought to her attention. This mitigating factor which the judge along, with the Chief Magistrate, took into account was that the applicant had no previous convictions for any drug matter; he was not previously sent to prison. The aggravating feature is that the applicant did not plead guilty. The Court agrees with the observation of the judge that the question which needed to be answered is what is the appropriate discount to give to someone engaged in this very serious activity who has no previous criminal convictions. Mr. Justice Henderson went on to indicate that, in his view, a discount of one year is not unreasonable.

16. This Court agrees with the conclusion reached by Mr. Justice Henderson that in the circumstance the sentence of 14 years imprisonment is not excessive. The correct starting point under the Guideline for a person convicted after a trial for an offence such as this which involved the substantial importation of 987 grams or 34 ounces of cocaine salt hydrochloride is 15 years. Both the judge and the Chief Magistrate took into account the only mitigating factor, no previous conviction for any drug matter. We do not consider

that there is any basis to grant the applicant leave to appeal as such appeal would have no prospect of success.

Mottley JA

Campbell JA

Martin JA